No. 14372

United States Court of Appeals
For the Ninth Circuit

CHARLES SCHIFFMAN, *Appellant*,

— vs. —

FRED T. WILKINSON, Warden, United States Penitentiary, McNeil Island, Washington, *Appellee*,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANT

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SUBJECT INDEX

TABLE OF CASES

STATUTES

OTHER AUTHORITIES CITED

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STATEMENT OF PLEADINGS and FACTS DISCLOSING JURISDICTION

The District Court had jurisdiction to decide the question on writ of Habeas Corpus (Title 28, U.S.C., Sec. 2255). The appellant filed a petition for writ of Habeas Corpus (Tr. 3) and the court issued a Writ of Habeas Corpus (Tr. 7). The Warden of McNeil Island answered by and through the United States Attorney (Tr. 8) and admitted that the court had jurisdiction but denied that he was entitled to release. This court has the authority to review the decisions of a District Court within its jurisdiction.

STATEMENT OF CASE

The questions involved in this appeal are the same questions submitted to the District Court.

A. Can the appellant be held for a parole violation when it appears from the record that the indictment

and arrest for which his parole was revoked, occurs after the expiration of the time he was on parole?

B. It is further submitted that the facts will reveal that the warrant of arrest for the parole violation was illegally issued because the time for the appellant's parole period had expired.

C. Is the appellant entitled to the benefit of Title 18, U.S.C.A., Section 4164 an amended on June 29, 1951?

These are the questions involved in this appeal and will be argued in this brief.

SPECIFICATION OF ERRORS

The statement of points set out in (Tr. 35) are adopted as the Specification of Errors and will be argued in this brief. They are:

1. The petitioner was entitled to be released on a Writ of Habeas Corpus because his sentence began to run on May 6th, 1942, and according to the law (Sec. 4164, Title 18, U.S.C.A.) he was deemed released on parole 180 days prior to the end of the ten-year terms he was originally sentenced to. His parole ended on November 8, 1951, and the warrant for his parole violation was not issued until May 2, 1952.

2. The warrant for violation of parole was illegally issued because the petitioner's time was expired.

3. The court was in error in holding that the warrant of May 2, 1952 was legally issued and was in error in concluding that the petitioner had assumed the status of an escapee.

4. The District Court was in error in holding that

the petitioner was not entitled to the benefits of Sec. 4164, Title U.S.C.A. 18.

5. The respondent has no legal right to detain the petitioner and he is being held in violation of his constitutional rights and against the law of the United States.

ARGUMENT

Before presenting an argument on the position of the appellant it is respectfully urged that certain dates be kept in mind.

May 14, 1940 was the date the appellant was arrested on a warrant issued by the United States District Court in Fort Worth, Texas (Tr. 9).

July 18, 1940 he was sentenced to 10 years imprisonment (Tr. 9).

July 31, 1940 he was surrendered to the Illinois state authorities on a state charge. After that charge was completed he was on *May 6, 1942* transferred to Leavenworth and began his sentence for the Federal Violation.

January 22, 1949 he was released on parole.

March 7, 1952 he was indicted in the United States District Court for Northern District of California (Tr. 25) and was on

November 26, 1952 sentenced in said court for the violation to three years (Tr. 29) to run concurrently with the sentence heretofore imposed by the United States District Court in Texas.

January 23, 1953 the United States District Court in San Francisco reduced the sentence to eighteen months (Tr. 31).

November 8, 1951 expiration of maximum term less 180 days (termination of conditional release) 18 U.S. C.A. 4164.

May 2, 1952 a warrant was issued by United States Parole Board for Parole violation.

May 6, 1952 maximum expiration date of ten-year sentence imposed by District Court of United States for Northern District of Texas.

February 6, 1954 petitioner conditionally released on parole from 18 months' sentence imposed on *November 26, 1952*, and a warrant of retaking issued on *May 2, 1952* executed upon him at that time.

Statutes Considered

Title 18, U.S.C.A., Section 4205:

> "Sec. 4205. Retaking parole violator under warrant: time to serve undiminished.
>
> "A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve." June 25, 1948, c. 645, 62 Stat. 854.

Title 18 U.S.C.A., Section 4164:

> "Sec· 4164. Released prisoner as parolee.
>
> "A prisoner having served his term or terms less good time deductions shall, upon release, be deemed as if released on parole until the expira-

tion of the maximum term or terms for which he was sentenced less one hundred and eighty days." Added June 29, 1951, c. 176, 65 Stat. 98.

On June 29, 1951, Title 18 U.S.C.A., Section 4164 was amended to provide that a prisoner who has served his sentence less good time deductions, shall be released unconditionally if there remain less than 180 days to serve, and if there remains a greater period to serve, the prisoner will be treated upon release as if he were on parole until the expiration of the maximum term or terms, less 180 days.

For the legislative history and purpose of the amendment of June 29, 1951, see 1951 U.S. Code Congressional and Administrative Service, pp. 1544-1547.

The amendment was prompted by the considerable expense and trouble the Department of Justice was put to in returning to custody the relatively minor number of conditional releasees who violate the terms of their release under Section 4164, and who have short unexpired terms to serve (Senate Report No. 385, June 4, 1951). Section 4164 applies only to those prisoners who have earned commutation while in the institution but who have not been considered for parole. "It involves what the board of parole has considered to be the least hopeful group" (Letter of Peyton Ford, Deputy Attorney General, to Hon. Pat McCarran, Chairman of Senate Committee on the Judiciary, dated April 11, 1951, relating to the proposed amendment of Section 4164).

In the case at bar, petitioner, Charles Schiffman, was conditionally released from imprisonment on January 22, 1949. The foregoing amendment to Section

4164 did not become effective until June 29, 1951. The first question to be considered is: *Whether the amendment applies retroactively to prisoners who were at the time of its enactment, under parole supervision for the remainder of their maximum sentences.*

The foregoing question is answered affirmatively in *Edelson v. Sweet* (U.S.C.A., 2nd Circ., June 6, 1952) 197 F.2d 147. There the petitioner asked for judgment declaring that he was unconditionally released from his prison sentence and parole supervision. His term of incarceration, commuted for good conduct, ended January 14, 1951, and he was conditionally released under Section 4164 for the remainder of his maximum term. His maxium term was scheduled to expire on June 16, 1952. Petitioner contended, and the court so held, that in view of the amendment to Section 4164 his sentence and parole supervision ended on December 16, 1951, which was 180 days prior to the expiration of his maximum term.

Moorehead v. Hunter (U.S.C.A., 10th Circ., July 1, 1952) 198 F.2d 52, is not contrary to the holding in *Edelson v. Sweet, supra.* The question before the court in *Moorehead v. Hunter, supra,* was whether the amended section applies to an infraction or violation of a conditional parole on which a warrant for parole violation was issued *prior* to the effective date of the amendment although the hearing or trial thereon was not had until after the effective date of said amendment. It was held that under such circumstances the amendment was not applicable.

Shepherd v. United States Attorney General (U.S. D.C.M.D. Pa., Oct. 21, 1952) 108 F.Supp. 13, is also

inapplicable to the case at bar. There a warrant for violation of parole was issued prior to the expiration of the maximum sentence and almost two and one-half years before the June 29, 1951 amendment to Section 4164. The said warrant was not executed until after the petitioner's release from his second sentence, which was subsequent to the date of the said amendment. The court there held that the amendment did not operate retroactively to reduce the time to be served on the first sentence by 180 days.

In the case at bar, the petitioner Charles Schiffman was released conditionally on January 22, 1949. The warrant for his violation of parole was issued after the effective date of the 1951 amendment to Section 4164. It would appear therefore that absent the other factors which will hereinafter be considered, the June 29, 1951 amendment to Section 4164 is applicable to the case at bar.

Having once decided that the June 29, 1951 amendment to Section 4164 is applicable to the petitioner, absent other factors, it becomes necessary to consider the "other factors" present in the case at bar and the legal effect thereof.

The "other factors" are:

1. The petitioner was indicted for an act which constituted a violation of his parole. The said act was committed prior to the expiration of his maximum term less 180 days. The petitioner pleaded guilty to the said indictment and was sentenced to imprisonment.

2. The warrant of retaking in the case at bar was

issued on May 2, 1952, which was "within the maximum term" as set forth in Section 4205, but after the maximum term less 180 days as set forth in Sec. 4164.

In considering the other factors, the following questions arise:

1. Did the parole violation which occurred prior to the expiration of the maximum term toll the expiration of the maximum term and thus make the date of the issuance of the warrant of retaking immaterial?

2. Assuming that the answer to the foregoing question is "No" what is meant by "within the maximum term" as those words are used in Section 4205? In view of the 1951 amendment to Section 4164 does the "maximum term" as used in Section 4205 mean "maximum term * * * less 180 days?"

There is a peculiar situation presented in the case at bar which gives rise to a question of statutory construction. The warrant of retaking issued on May 2, 1952, was issued four days prior to the expiration of the maximum term or sentence imposed upon the petitioner and which he commenced serving in May 7, 1942. If the words "maximum term" as used in Section 4205 are construed to mean the maximum expiration date of his sentence, then the warrant was timely issued. If the words "maximum term" as used in Section 4205 are construed to mean "maximum term less 180 days" as a result of the 1951 amendment to Section 4164, then the warrant was not timely issued.

The case of *Wall v. Hunter*, 105 F.Supp. 54 (Kansas 1952) is exactly in point. The court therein applied the new statute [Sec. 4164] and held that it applied

and also held that the warrant issued and served during the 180 days' period was illegal and the writ was granted. That case has not, to the writers' knowledge, been reversed.

It is urged that according to the cases cited herein the appellant was entitled to the benefits of Sec. 4164, *supra*. The decision in the *Edelson v. Sweet* case, *supra*, applies now. Now the appellant was, for the purposes of this argument, a free man on November 8, 1951. The warrant, by virtue of which the appellant is now being held was not issued until May 2, 1952.

If the new law (Sec. 4164) applies in this case and if it means anything at all, then the Parole Board had no authority to issue a warrant after the expiration of the term of the prisoner's sentence.

Of what benefit is the statute if a man can be charged with a violation of his parole six months after the law says he is free. Then the further point must be urged the warrant was not until February 6, 1954 (Tr. 16) served or executed. Can the Parole Board issue a warrant after the time had expired and serve it 27 months after said term had expired? We think not.

The lower court herein relies upon a decision of this court, *Klinker v. Squier*, 144 F.2d 490, and quotes from this decision (Tr. 12) the conclusion that this court reached, that the running of the term of a criminal sentence is tolled from the date of an offense constituting a parole violation and the date of the issuance of the warrant is not controlling.

This case and those cited by this court refer to a situation within a "minimum" sentence. It is respect-

fully submitted that under Sec. 4205 of Title 18, U.S. C.A., set forth completely in the first part of this brief, requires that a warrant for the retaking of a parole violator may be issued by the Parole Board "within the maximum term or terms for which he was sentenced."

Since the enactment of Sec· 4164, *supra*, which was not in existence in its present form at the time of the above decision by this court, it is submitted that this court must give effect to the meaning of Sec. 4205 and in the case before the court, no warrant was issued during the maximum term to which Schiffman was sentenced.

In point is the case of *Hyche v. Reese*, 61 F.Supp. 646 (Dist. Ct. Miss. 1945) in which the petitioner's parole was due to expire March 24, 1945. Several months prior thereto, he was charged with violating Internal Revenue Laws and the Parole Board was notified. On December 19, 1944, the Parole Board filed a warrant for his arrest, but did not deliver it to any officer for execution until April 19, 1945. The petitioner continued to make his monthly reports to the Parole Officer. In April, 1945, he was convicted and sentenced. Thereafter, the Parole Board delivered the warrant to the Marshal for execution. The court held:

> "I am of the opinion that when the warrant was held by the Parole Board and not delivered to an officer for execution within the time of the term of his sentence, that the Parole Board lost its jurisdiction to retake him. His parole cannot be revoked after the expiration of his term.
>
> "Escape interrupts the service but in the present case there was no escape or evasion as peti-

> tioner reported regularly to his Parole Officer. The fact that the warrant was signed during the term is not controlling * * *. As a matter of law, a writ is 'issued' when it is delivered to an officer with the intent to have it served. It means to send forth, to put in circulation."

The court further states in the *Hyche v. Reese*, *supra*, decision on page 647: "As a matter of law a writ is 'issued' when it is delivered to an officer with the intent to have it served. It means to send forth, to put in circulation."

Did the Parole Board intend to have the Schiffman writ "issued" when it was held by somebody from May 2, 1952 and not executed until February 6, 1954? Surely intent can only be inferred from acts and 21 months cannot be a reasonable time under any set of circumstances.

Welch v. Hillis, 53 F.Supp. 456, holds a warrant "should be executed within a reasonable time, and what would be a reasonable time would depend upon the circumstances of the particular case."

See also *Clark v. Surpruvant*, 94 F.2d 969, where the warrant was not executed until a month and a half after the end of the term of the sentence but issued before the expiration of said sentence. (Here we have 21 months' delay.) The court sustained the District Court's decision in granting the Petition for Habeas Corpus.

CONCLUSION

1. The appellant is entitled to the benefits of Sec. 4164 based upon the decisions of appellate courts cited herein.

2. If so entitled to the benefit of the law duly enacted by Congress the appellant was unconditionally released on November 8, 1951.

3. The Parole Board had no jurisdiction or authority to issue a warrant after the expiration of his term, which according to law, ended November 8, 1951.

4. Having issued the warrant on May 2, 1952 it was void and of no effect, and even if it should be declared to be validly issued it was not executed within a reasonable time.

It is respectfully urged that the District Court be reversed and directed to release the appellant because he is being illegally detained in violation of his constitutional rights.

Respectfully submitted,

JEFFREY HEIMAN,
Attorney for Appellant.